When the promisee purposely blocks him so as to make performance impossible, whether this is effected by forcible[6] prevention or by adversely[7] controlling or affecting a *sine qua non* of the contract, the promisor should be excused. This is equally so when the complete obstruction is unintentional[8] or indirect.[9] When the promisee does not prevent, but purposely hinders[10] performance, so that it is possible only by greater effort or expense, the promisor should again be excused. But when the hindrance is unintentional, it may well be doubted whether, as an inflexible rule, it should excuse the promisor. The necessary exceptions[11] can be determined by applying the principle underlying the preceding defenses. It is not a theory of legal interpretation of the contract, nor the limited equitable defense of impossibility, but an extension of equitable defenses at law to include the idea that parties to a contract should be required to deal fairly with each other.[12] When, therefore, the defense of prevention or hindrance is raised by the promisor, the question is not only what were the terms of the contract, but whether, in the particular circumstances, the situation is such that a reasonable man would consider it unfair to the promisor to hold him accountable for non-performance.[13]

A defense of this nature might have been allowed in a recent case where, owing to the negligence of the promisee's representatives, the lease of a quarry, from which the promisor contemplated supplying stone called for under the contract, expired before the promisor could have performed. The court allowed recovery on the ground that performance was not thereby made impossible.[14] *United States* v. *Conkling & The Fidelity, etc., Co.*, 37 N. Y. L. J. 129 (C. C. A., Second Circ., March, 1907). But a failure to allow a defense on a ground short of impossibility not only may work injustice, as in the present case, but would seem to involve the harsh implication that a promisee may succeed even when he hinders and obstructs the promisor purposely, so long as he does not prevent performance absolutely.

RECENT CASES.

ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — PUBLIC CORPORATION INVESTED WITH TITLE OF PUBLIC SCHOOLHOUSE SITES. — A state statute, framed to establish and maintain a system of free schools, made the trustees of schools of each township a body politic and corporate, and invested it with the title and care of the schools and the schoolhouse sites. The appellee, such a corporation, brought ejectment against the appellant, who had occupied part of a schoolhouse site adversely for more than twenty years. *Held*, that the statute of limitations is a good defense. *Brown* v. *Trustees of Schools*, 224 Ill. 184.

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[6] Jarrell *v.* Farris, 6 Mo. 159. Under the early common law the promisor was excused only in case of forcible prevention. 1 Rolle Abr. 453 N ; Co. Litt. 206 *b*; Fraunce's Case, 8 Coke 89, 92.

[7] Connelly *v.* Devoe, 37 Conn. 570; King *v.* King, 69 Ind. 467.

[8] United States *v.* Peck, 102 U. S. 64. For the promisor's right of recovery for loss, see Peck's Case, 14 Ct. Cl. (U. S.) 84.

[9] Murray *v.* Kansas City, 47 Mo. App. 105.

[10] Taylor *v.* Risley, 28 Hun (N. Y.) 141.

[11] *Cf.* Patterson *v.* Gage, 23 Vt. 558.

[12] Taylor *v.* Risley, *supra*.

[13] See Anvil Mining Co. *v.* Humble, 153 U. S. 540, 552.

[14] *Cf.* Fidelity, etc., Co. *v.* U. S., 137 Fed. Rep. 866.

It is well settled that the statute of limitations does not run against the state. In view of this, the sound principle would seem to be that the statute does not run against a municipal corporation when it acts for the state in enforcing rights for the benefit of the general public, in contradistinction to when it acts in a private capacity or for the benefit of a locality. See 15 HARV. L. REV. 846. Similarly, the statute should be held inapplicable to any public corporation performing duties in behalf of the state in the administration of government. See *Simplot* v. *Chicago, etc., Ry. Co.*, 16 Fed. Rep. 350, 361. When a state adopts a common free school system, a public corporation invested in pursuance of this policy with the title and care of schools and schoolhouse sites would seem to be an auxiliary of the state in the administration of education, and hence a manager of the property for the benefit of the public, though the exercise of its duties may chiefly benefit the inhabitants of a locality. Accordingly, the statute of limitations should not run against it. See *Board of Education* v. *Martin*, 92 Cal. 209.

BANKRUPTCY — PREFERENCES — STATUTES REQUIRING RECORDING OF TRANSFERS. — A chattel mortgage was given for an antecedent debt by an insolvent more than four months before bankruptcy proceedings, but was recorded within the four months. § 4150 of the Ohio Revised Statutes, 1906, made unrecorded mortgages invalid against creditors. § 60 *a* of the Bankruptcy Act, as amended in 1903, provides that the period of four months does not expire, where the preference consists in a transfer, until four months after the recording, "if by law such recording or registering is required." *Held*, that the Ohio statute "requires" recording within the meaning of the Act. *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. Rep. 975 (C. C. A., Sixth Circ.).

Two cases dealing with somewhat similar statutes held that, since unrecorded transfers were valid between the parties themselves, recording was not "required" within the meaning of the Act. *Myers, etc., Co.* v. *Pipkin, etc., Co.*, 136 Fed. Rep. 396; *In re Hunt*, 139 Fed. Rep. 283. The court in the present case bases its decision on the other extreme view that recording is "required" whenever necessary to give validity to a transfer as against any class of persons. It is believed, however, that the cases are reconcilable, since in the present case creditors, as well as *bona fide* purchasers, are protected by the recording statute against unrecorded transfers, while by the statutes in the other cases creditors were not; and "required," as used in the Act, may be fairly said to mean "required in order to be good against creditors." It seems proper thus to go behind the *prima facie* meaning of the words of the Act, for, since no statutes make an unrecorded transfer entirely void, any other result would render the provision in the Act of no effect. *Cf. Barlow* v. *Ross*, 24 Q. B. D. 381. Under this interpretation the present decision seems sound, and its result is supported by authority. *English* v. *Ross*, 140 Fed. Rep. 630; *First Nat'l Bank* v. *Connett*, 142 Fed. Rep. 33.

BANKRUPTCY — PROVABLE CLAIMS — GOODS OF OTHER PERSONS IN POSSESSION OF BANKRUPT. — The plaintiff bought goods and left them in the possession of the vendor for purposes of sale. Later the vendor became bankrupt with the goods still in his hands. *Held*, that, though the goods passed to the trustee in bankruptcy by the express words of the English statute, the plaintiff may prove for their value. *In re Button*, 51 Sol. J. 373 (Eng., Ct. App., March 26, 1907).

Though this case comes up under the English Bankruptcy Act, which provides expressly that the title to goods in the order or disposition of the bankrupt shall pass to the trustee, it seems that a similar question may arise in this country under § 70 *a* (5) of our act, which provides that any property which might have been levied on will pass to the trustee. For example, it would seem that in those jurisdictions where the creditors of a conditional vendee are preferred to the vendor, the vendee's trustee in bankruptcy would take title to the goods. So the trustee of an ordinary vendor would take in those states which hold that retention of possession is such conclusive evidence of fraud

that his creditors may have the goods sold. It being clear, then, that the title would pass to the trustee in these instances, the same reasons for allowing the owner to prove would exist here as in England; for the "order and disposition" clause of the English statute and the American law governing conditional vendees and retaining vendors have the common object of preventing fraud, and if the penalty will be mitigated in England to the extent of allowing proof, it might also be done here.

BANKRUPTCY — PROVABLE CLAIMS — UNLIQUIDATED DAMAGES FOR TORTS. — The plaintiffs, having a claim for unliquidated tort damages, sought to liquidate and prove their claim against the defendants' bankrupt estate. They contended that § 63 *b* of the Act of 1898, providing for the proof of unliquidated damages, applied to torts, and that § 17, as amended in 1903, excepting certain tort liabilities from discharge, established this interpretation. *Held*, that the claim is not provable. *Brown & Adams* v. *United Button Co.*, 149 Fed. Rep. 48 (C. C. A., Third Circ.).

Even before 1903, § 63 *b* gave rise to the view that unliquidated damages for torts could be proved. See *Beers* v. *Hanlin*, 99 Fed. Rep. 695. But the history of bankruptcy legislation shows that this sub-section refers to provable unliquidated mercantile claims enumerated in sub-section 63 *a*. The first national bankruptcy act of 1800, in order to avoid the harshness of the English bankruptcy laws, which disallowed unliquidated contractual claims, provided in § 58 for their liquidation and proof. *Cf. Ex parte Charles*, 14 East 197. And the later federal acts contained similar provisions. But proof was not extended to unliquidated tort claims in the absence of express statutory provisions. *In re Schuchardt*, 15 N. B. R. 161. This was the better interpretation of the present act prior to the amendment of § 17 in 1903. *In re Hirschman*, 104 Fed. Rep. 69. This amendment, however, by excepting "liabilities" for certain torts from discharge, implies, if "liabilities" includes "unliquidated damages," that unliquidated damages for torts in general are provable, since only provable claims need be excepted from discharge. *Cf. Graham* v. *Richerson*, 8 Am. B. Rep. 700. But § 17 may be harmonized with the better doctrine of the original act by construing "liabilities" as meaning only liquidated tort liabilities, namely, judgments, which are conceded to be provable claims. *Howland* v. *Carson*, 16 N. B. R. 372.

BANKS AND BANKING — DEPOSITS — RIGHTS OF DEPOSITOR UPON SUB-DEPOSIT BY DEPOSITARY BANK. — In order to stifle competition, several banks made an agreement by which bank A submitted the highest bid for county funds and thereby secured the deposit. Following out the agreement, bank A deposited a certain part of the county funds received by it with the other banks. Bank A failed. *Held*, that the county may recover the sums on deposit in the other banks in preference to the trustee in bankruptcy of bank A. *In re Blake*, 150 Fed. Rep. 279 (C. C. A., Eighth Circ.).

This decision affirms that of a lower court, commented upon in 20 HARV. L. REV. 140.

BILLS AND NOTES — DEFENSES — TIME GIVEN PRINCIPAL JOINT MAKER. — The defendant signed a joint and several note, intending to become a surety, as the payee knew. The payee made a binding contract with the principal for an extension of time without the defendant's knowledge, and the latter claimed to be discharged. He did not allege that the payee accepted him as surety. *Held*, that he is not discharged. *Vanderford* v. *Farmers & Mechanics Nat'l Bank*, 66 Atl. Rep. 47 (Md.).

In England the granting of an extension of time by a holder who knew that one maker was only a surety, discharged such surety in equity. *Fentum* v. *Pocock*, 5 Taunt. 192. By statute the equitable plea is now good at law. *Pooley* v. *Harradine*, 7 E. & B. 431. In the United States the general rule has been that the surety was discharged at law as well as in equity. See 2 AMES, CAS. ON BILLS AND NOTES, 82, n. 2. But it seems that when courts of law cannot hear equitable pleas the law should not recognize the discharge, since it

is strictly a matter of equity, the surety being legally bound as joint and several maker. New Jersey has followed this strict line of differentiation. *Anthony* v. *Fritts*, 45 N. J. L. 1. Maryland, also, has not admitted the plea at law, except possibly when the payee has agreed to regard the defendant as surety. *Owings* v. *Baker*, 54 Md. 82. The Negotiable Instruments Law, adopted in Maryland, makes no provision for the peculiar facts of this case, but seems to leave the law unchanged by providing that a person primarily liable is discharged, *inter alia*, "by any act which will discharge a simple contract for the payment of money." See CRAWFORD, ANN. NEG. INST. LAW, § 200 (4).

CARRIERS — BAGGAGE — LIABILITY FOR LOSS OF BAGGAGE UNACCOMPANIED BY OWNER. — The plaintiff checked trunks on the defendant railroad, intending to follow in person some days later. The baggage was destroyed in the railroad's hands after arrival at its destination. *Held*, that the defendant is subject to greater liability than a gratuitous bailee. *McKibbin* v. *Wisconsin Cent. Ry. Co.*, 110 N. W. Rep. 964 (Minn.).

The more recent cases have seemed to hold that, in general, the carrier's liability for loss of baggage is that of a gratuitous bailee unless the passenger is on the train with his trunks. *Wood* v. *M. C. R. R. Co.*, 98 Me. 98; *cf.* 17 HARV. L. REV. 354. But the present decision greatly modifies this sweeping doctrine. In the previous cases the parties checked trunks either without buying a ticket or, if buying one, without intending to use it in the near future. But when the owner intends to follow his trunks, on the same ticket and on the same journey, another question is presented. In this situation it would seem that the carrier should incur full liability. *Chicago, etc., R. R. Co.* v. *Fairclough*, 52 Ill. 106; *contra*, *Laffrey* v. *Grummond*, 74 Mich. 186. Under the modern system of travel it will frequently happen that a passenger will not be on the same train with his baggage, especially if the trunks are checked through a transfer company. Similarly, the carrier is held liable if through its fault baggage is checked over a different route. *Isaacson* v. *N. Y., etc., R. R. Co.*, 94 N. Y. 278. The circumstances may sometimes be such as to hold the carrier liable for the trunk as freight. *Wilson* v. *Grand Trunk Ry.*, 57 Me. 138.

CARRIERS — DISCRIMINATION AND OVERCHARGE — OFFENSES OF SHIPPERS UNDER ELKINS ACT. — Two indictments lay against the defendant under the Elkins Act. One alleged that, the established through rate for the transportation of petroleum from Olean to Rutland *via* the Pennsylvania Railroad and three connecting carriers being 19 cents per hundred pounds, the defendant accepted a rate of 16.1 cents per hundred pounds for the transportation of petroleum from Olean to Rutland *via* the Pennsylvania Railroad and two connecting carriers. The other indictment alleged that the defendant accepted a rate of 17 cents per hundred pounds for the transportation of petroleum from Olean to Burlington, when it knew that the carrier refused to transport petroleum for competitors from places near Olean to Burlington for less than 33 cents per hundred pounds. The defendant demurred to both indictments. *Held*, that the demurrers be overruled. *United States* v. *Standard Oil Co. of New York*, U. S. Dist. Ct., W. D. N. Y., April, 1907. See NOTES, p. 635.

CONFLICT OF LAWS — ASSIGNMENT OF CONTRACTS — EFFECT IN FOREIGN STATE OF FAILURE TO RECORD. — A citizen of Michigan, engaged in business there, made in Connecticut an unrecorded assignment of all future book accounts and bills receivable. By Connecticut law assignments of future earnings are not valid against creditors of the assignor unless recorded; by Michigan law no recording is necessary. Bankruptcy proceedings were instituted in Michigan against the assignor. *Held*, that the assignment is valid against creditors. *Union Trust Co.* v. *Bulkeley*, 150 Fed. Rep. 510 (C. C. A., Sixth Circ.). See NOTES, p. 637.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — VALIDITY OF TRUST PERFORMABLE OUTSIDE JURISDICTION OF CREATION. — A testatrix, domiciled in the District of Columbia, devised realty there situated to a New York cemetery company, which was to hold it in trust for certain persons for life, and then

to convert it into securities and to use the income therefrom in keeping a New York cemetery lot in perpetual order. One section of the code of the District of Columbia expressly permits a domestic cemetery association to take and to hold such a gift; but a later section provides that, except for a gift to a charitable use, every future estate shall be void in its creation which suspends the power of alienation beyond prescribed limits. Under New York law the trust could be administered. *Held*, that the provisions in the will are valid. *Iglehart* v. *Iglehart*, 27 Sup. Ct. Rep. 329.

See, for a discussion of the principles involved, 19 HARV. L. REV. 457; 20 *ibid.* 382.

CONSTITUTIONAL LAW — CLASS LEGISLATION — LEGISLATION AFFECTING ONLY CORPORATIONS. — A statute required that "railroad and other corporations" answer in damages for injuries to employees caused by superior servants. *Held*, that the statute is unconstitutional, because it imposes a burden on corporations different from that on natural persons doing business under the same circumstances, and that it cannot be sustained as an amendment to the incorporation laws, because it is applicable to foreign as well as domestic corporations. *Bedford Quarries Co.* v. *Bough*, 80 N. E. Rep. 529 (Ind., Sup. Ct.). See NOTES, p. 634.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHTS INFRINGED BY ACTION OF INDIVIDUALS. — The defendants took a prisoner from the custody of state officers and lynched him. They were indicted under a federal statute providing for the punishment of persons who should conspire to prevent or hinder the free exercise or enjoyment by any citizen of any right or privilege secured to him by the Constitution or laws of the United States. *Held*, that the demurrer to the indictment be sustained. *United States* v. *Powell*, 151 Fed. Rep. 648 (Circ. Ct., N. D. Ala., N. D.).

This case overrules a previous decision by the same court, criticized in 18 HARV. L. REV. 391. The view of the court is unchanged, but it considers itself bound by a dictum of the United States Supreme Court uttered meanwhile. See *Hodges* v. *United States*, 203 U. S. 1.

CONSTITUTIONAL LAW — POWERS OF JUDICIARY — REFUSAL TO IMPOSE STATUTORY PENALTY. — A statute made it unlawful "to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection." After the destruction of San Francisco, the agents of a steamship about to leave sold tickets to more persons than was permitted. Though the ship's officers exercised due diligence to prevent violation of the law, ticket-holders in excess of the lawful number boarded the ship unnoticed and were not discovered until after sailing. *Held*, that the steamship is not liable for the statutory penalty. *The Charles Nelson*, 149 Fed. Rep. 846 (Dist. Ct., W. D. Wash., N. D.).

The court seems to have considered that, in the extraordinary circumstances under which this voyage was undertaken, it was vested with a discretion to refuse to impose the statutory penalty. But a court can neither extend a statute to meet a situation which it does not include, nor, if the situation fairly falls within the provision, restrict the scope of the statute to avoid injustice. *Stevens* v. *Ross*, 1 Cal. 94; *The Sam Slick*, 2 Curt. (U. S.) 480. Where the act prohibited is one commonly involving moral turpitude, courts frequently relieve the apparent harshness of penal statutes by interpreting them as requiring that a guilty mind co-exist with the act. *The Queen* v. *Tolson*, 23 Q. B. D. 168. But that interpretation is not usually made when the statute is in the nature of a police regulation. *People* v. *Kibler*, 106 N. Y. 321. That it was the legislative purpose to make an absolute prohibition in the present case is shown by the provision giving the Secretary of the Treasury power to remit such penalties. U. S. REV. STAT., § 5294. However, the result in the principal case may be upheld, since the thing forbidden is strictly the act of taking on board, and that act does not seem to have been committed.

CONTRACTS — DEFENSE OF IMPOSSIBILITY — PERFORMANCE PREVENTED BY PROMISEE. — The promisor agreed to supply the promisee with stone which the contract contemplated would be taken from a quarry leased to the promisee, but which was obtainable elsewhere. Owing to the promisee's neglect, the lease ran out before performance was possible, and the promisor was dispossessed. The promisee sued the promisor's surety for non-performance. *Held*, that the promisor was not prevented from performing, and that the surety is liable. *United States* v. *Conkling & The Fidelity, etc., Co.*, 37 N. Y. L. J. 129 (C. C. A., Second Circ., March, 1907). See NOTES, p. 643.

CONTRACTS — DEFENSES — INCREASED RISKS. — The plaintiffs had agreed to serve as seamen on board a vessel carrying coal, and to go to any port between certain degrees of latitude. At the time of the contract, war had been declared between two foreign powers and coal had been made contraband. On learning that the vessel was bound to a belligerent port, though between the stated degrees of latitude, the plaintiffs refused to continue the voyage, and, on their return home, sued for wages. *Held*, that wages are recoverable down to the date of the judgment. *Caine* v. *The Palace Shipping Co.*, 23 T. L. R. 203 (Eng., Ct. App., Dec., 1906).

For a discussion of the principles involved, see 19 HARV. L. REV. 462.

CRIMINAL LAW — DEFENSES — JUDGMENT FOR FINE ABATED BY DEATH OF DEFENDANT. — One P. was convicted of giving rebates, and judgment was entered against him for $6,000 in fines. Subsequently to the judgment P. died. *Held*, that the judgment be declared abated. *United States* v. *Pomeroy*, U. S. Circ. Ct., S. D. N. Y., Feb. 27, 1907.

There seems to be no direct authority, other than this decision, as to whether, after judgment in a criminal action imposing a fine, the death of the defendant avoids such judgment. It has been held, however, that when a statute makes a penalty payable to the injured party, such payment cannot be enforced by his executor. *Reed* v. *Cist*, 7 Serg. & R. (Pa.) 183; *cf. Darlington* v. *Roscoe*, 96 L. T. R. 179. The reason is that the fine is not regarded as compensation, but as a purely personal right to enforce a penalty. This reason should apply equally to the present case. If the fine were regarded as a compensation to the state the defendant's estate should be liable. But the fact that this is a criminal action in which the defendant's guilt must be proved beyond a reasonable doubt negatives this idea, since an action for compensation requires only a preponderance of evidence. Assuming, therefore, that the fine imposed was punitive, since it became impossible to inflict the punishment on the defendant, there would seem to be no reason why the burden should fall on his estate.

CRIMINAL LAW — FORMER JEOPARDY — IDENTITY OF OFFENSES. — The defendant was convicted, under § 1 of the Sherman Anti-Trust Act, of a combination in restraint of interstate commerce, and, under § 2, of an attempt to monopolize a part of interstate commerce. *Held*, that the offenses are not identical. *United States* v. *MacAndrews and Forbes Co.*, 149 Fed. Rep. 836 (Circ. Ct., S. D. N. Y.). See NOTES, p. 642.

EMINENT DOMAIN — FOR WHAT PURPOSES PROPERTY MAY BE TAKEN — ELECTRIC POWER PLANT. — In an action to condemn land the plaintiff alleged that it had obtained a franchise to supply a certain community with electric light, heat, and power, and that it was necessary to take the property in question in order to perform the service. *Held*, that the complaint sufficiently shows the plaintiff's right to condemn. *Shasta Power Co.* v. *Walker*, 149 Fed. Rep. 568 (Circ. Ct., N. D. Cal.).

The condemnation of property for other than a public use is unconstitutional. *Matter of Tuthill*, 163 N. Y. 133. It has been held that to constitute a public use the public itself must take control of the property. *Board of Health* v. *Van Hoesen*, 87 Mich. 533. This doctrine, however, is ordinarily modified by simply requiring that the public be benefited to a sufficient extent. *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694. It is now generally held that

the public derives sufficient benefit from gas or electric lighting plants to justify a municipal bond issue for their erection. *State* v. *City of Toledo*, 48 Oh. St. 112. There would seem to be no valid distinction between furnishing electric light and furnishing electric power, yet to furnish the latter has been held not to be a public use. *State* v. *Superior Court*, 42 Wash. 660. If the benefit to the public is so slight as to be inappreciable, as where the power company has agreed to deliver almost its entire output to one individual, it would clearly be right to withhold the power of eminent domain. *Brown* v. *Gerald*, 100 Me. 351. In the absence of such circumstances, however, the better view supports the present case. *Amoskeag Co.* v. *Worcester*, 60 N. H. 522; see 15 HARV. L. REV. 399.

EMINENT DOMAIN — NATURE OF RIGHT — INDEPENDENT OR DERIVATIVE TITLE. — The defendant conveyed to the plaintiff with a covenant of warranty against lawful claims of "all persons claiming by, through, or under me." At the time of the conveyance there existed an easement taken by eminent domain proceedings. *Held*, that the existence of the easement is not a breach of the covenant. *Weeks* v. *Grace*, 80 N. E. Rep. 220 (Mass.).

A title acquired by escheat or forfeiture is derivative. See 4 KENT, COMM., 427. But one conveyed by a tax sale is a new, independent title granted by the state, and not merely the sum of all outstanding claims and estates. See *Hefner* v. *Northwestern Ins. Co.*, 123 U. S. 747, 751. The right to take property for public use is inherent in sovereignty, and is not dependent on constitutions, which merely qualify the right by providing for compensation. *Sholl* v. *German Coal Co.*, 118 Ill. 427. The exercise of this right is an action *in rem*, and actual notice to the owner is unnecessary. *Appleton* v. *City of Newton*, 178 Mass. 276. A condemnation sale in admiralty, also an action *in rem*, conveys a new title. See *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 428. It would seem to follow that taking under eminent domain is not forcing the owner to transfer his title to the state, but is exercising an independent paramount right, and results in a form of ownership irrespective of any previous title. See *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 184. An exercise of the right of eminent domain subsequent to the conveyance is not a breach of even a general warranty, since all property is taken subject to the sovereign power. *Bailey* v. *Miltenberger*, 31 Pa. St. 37.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — ADMISSIBILITY OF TELEPHONE CONVERSATIONS. — A called B's office by telephone, and upon asking for B was told that he was out. After a short time A was called to his telephone, and was told that B had returned and was ready to talk to him. A did not know B's voice. *Held*, that evidence of what A heard the person purporting to be B say is admissible. *Godair* v. *Ham Nat'l Bank*, 80 N. E. Rep. 407 (Ill.).

A was called to his telephone by a person who purported to be B, but did not recognize B's voice. *Held*, that evidence of what was said to A is admissible. *Kansas City Star Co.* v. *Standard Warehouse Co.*, 99 S. W. Rep. 765 (Mo., K. C. Ct. App.).

Conversations by telephone are, as a general rule, admissible. See 20 HARV. L. REV. 156. Even when the witness does not recognize the voice of the speaker and there is no independent proof of his identity, the courts have applied this rule when the person answering the witness' call in the usual course of business purports to be the party called. *Guest* v. *Ry. Co.*, 77 Mo. App. 258; *Oskamp* v. *Gadsden*, 35 Neb. 7; but see *Kimbark* v. *Illinois, etc., Co.*, 103 Ill. App. 632. Business custom seems fully to justify this view. But where the witness is called to the telephone, there is nothing on which to rely save the assertion of an unknown person at an unknown place, and hence the probability of fraud is much greater. In such a case, therefore, the evidence would seem to be, not merely of little weight, but too dangerous to be submitted to a jury. This distinction is not noticed in the present Missouri case, and seems never to have been taken, though one case has been found reaching the result its recognition would bring about. *Vaughn* v. *State*, 130 Ala. 18. In the present Illinois case,

since the reply was substantially in response to the witness' call, the rule applied seems proper.

EXTRADITION — INTERNATIONAL EXTRADITION — EXTRADITION FOR ONE OFFENSE AND IMPRISONMENT FOR ANOTHER. — The relator was accused in one indictment of conspiring to defraud the United States, and in another of procuring the admission of goods into the United States in violation of statute. He was duly convicted and sentenced on the conspiracy charge, and having been released on bail pending an appeal fled to Canada after the affirmance of his conviction. The requisition of the United States was refused. Thereupon he was demanded for the crime charged in the second indictment and was surrendered to the United States. While in the hands of an officer he was arrested on a warrant sworn out on the conspiracy charge, and was imprisoned. *Held*, that the relator is improperly detained. *Johnson* v. *Browne*, U. S. Sup. Ct., April 8, 1907.

This decision affirms the decision of the lower court, commented upon in 20 HARV. L. REV. 71.

GUARDIAN AND WARD — INVALID APPOINTMENT OF GUARDIAN CONSTRUED AS CREATING VALID POWER IN TRUST. — A testator devised the residue of his estate to his children and appointed guardians of their estates, directing that they should receive, hold, and pay out as guardians all funds and securities belonging to the children. The mother survived the father. The New York Domestic Relations Law gives only the surviving parent the right of appointment of a guardian for the minor children. *Held*, that the will confers on the persons named a valid power to act as a legally appointed guardian would act with respect to the property devised by the father. *Matter of Kellogg*, 187 N. Y. 355.

The Domestic Relations Law confers upon the mother rights respecting minor children equal to those of the father; hence it is clear that the father has no general power to appoint guardians during the life of the mother. *Matter of Schmidt*, 77 Hun (N. Y.) 201. But while, as father, he is thus deprived of authority to designate who shall control the persons or property of his children, as testator his power to dispose of his own property seems unchanged. A common incident to testamentary disposition of property is the designation of how it shall be managed; and persons without authority to appoint guardians may direct who shall control property bequeathed by them to minor children. *Blanchard* v. *Blanchard*, 4 Hun (N. Y.) 287; aff. 70 N. Y. 615. Even where such a testator specifically purports to name a guardian, the courts have construed the will as appointing the so-called guardian trustee of the property devised. *Camp* v. *Pitman*, 90 N. C. 615; *contra*, *Brigham* v. *Wheeler*, 49 Mass. 127. The present will, while invalid as appointing guardians, clearly indicates the testator's lawful intention to give the persons designated the control of the residue left the children, and where the intent to create a power is clear, any words, however informal, are sufficient. *Turner* v. *Timberlake*, 53 Mo. 371.

INFANTS — UNBORN CHILDREN — CHILD EN VENTRE SA MÈRE NOT CONSIDERED BORN IF TO HIS DISADVANTAGE. — A testator devised an estate to A for life, with remainder to A's third, fourth, and every other son successively in tail, but added a proviso that the third or any later son "born in my lifetime" should take only a life estate with remainder over. At the testator's death A's third son was *en ventre sa mère*. *Held*, that he takes an estate tail. *Villar* v. *Gilbey*, [1907] A. C. 139.

This decision probably firmly establishes in the English law that, except for the purposes of certain rules of positive law, a child *en ventre sa mère* will not be considered born when it would be to his disadvantage. See 16 HARV. L. REV. 601.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACT. — The Act of Congress of June 11, 1906, c. 3073, 34 Stat. at L. 232, 233, provided that "every common carrier engaged in trade or

commerce . . . between the several states . . . shall be liable to any of its employees or in case of his death to his personal representative . . . for all damages which may result from the negligence of any of its officers, agents, or employees . . . ." *Held*, that the statute is constitutional. *Spain* v. *St. Louis & S. F. R. R. Co.*, 151 Fed. Rep. 522 (Circ. Ct., E. D. Ark., E. D.).

For a discussion of the constitutionality of this statute, see 20 HARV. L. REV. 481.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — EFFECT OF BILLING ON CHARACTER OF SHIPMENT. — A dealer under contract to supply wheat at Goldthwaite, Texas, in order to take advantage of the low intrastate freight rate in Texas, directed a seller to ship wheat to Texarkana, Texas, a point near the state line. The seller, at the time of shipment, did not know where the grain was to go after it reached Texarkana. Shortly after its arrival the dealer shipped the grain in the original cars under a bill of lading reading from Texarkana to Goldthwaite. *Held*, that this last shipment is not to be considered interstate. *Gulf, C. & St. F. Ry. Co.* v. *Texas*, U. S. Sup. Ct., Feb. 25, 1907.

When goods are shipped and billed from one state to another, the shipment is interstate throughout, though the last part of the journey may be over a railway entirely in one state. *Cincinnati, etc., Ry. Co.* v. *Interstate Com. Com.*, 162 U. S. 184. Furthermore, a carrier's business is interstate if he carries goods destined from one state to another, though his carriage is for a part of the journey entirely in one state and under a bill of lading for that part only. *The Daniel Ball*, 10 Wall. (U. S.) 557. It follows that a single shipment, intended to go beyond a state in one journey, is interstate, though it may begin under a bill of lading between two points in the same state. *Houston, etc., Co.* v. *Ins. Co. of North America*, 89 Tex. 1. In fact, the character of a shipment should be determined by the intent of the shipper, and not, as the reasoning of the present case suggests, by artificial divisions according to the bills of lading. See *State* v. *Gulf, C. & St. F. Ry. Co.*, 44 S. W. Rep. 542 (Tex.). The result in the present case is therefore right, since the shipper did not know of any further destination when he sent the goods to Texarkana. See *State* v. *So. Kan. Ry. Co. of Texas*, 49 S. W. Rep. 252 (Tex.).

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — EQUITABLE RELIEF FROM FORFEITURE INCURRED BY BREACH OF COVENANT. — The appellant demised premises to the respondent under a lease providing for the payment of taxes by the lessee and for re-entry by the lessor in case of default. The lessee negligently failed to pay a tax assessment. At the sale of the premises therefor a third party secured a tax title, which was allowed to become *prima facie* irredeemable by the lapse of time. In consequence of a threat by the holder of the tax title to enforce it unless the lessor ejected the lessee, the lessor instituted landlord and tenant proceedings. The lessee, contending that the tax sale was void, sought to enjoin these proceedings so as to be relieved from the forfeiture of his lease. *Held*, that, since the relief asked would involve the lessor in a suit against a *prima facie* irredeemable title, it be denied. *Kann* v. *King*, 204 U. S. 43. See NOTES, p. 640.

MORTGAGES — EFFECT OF MORTGAGE — LIABILITY OF MORTGAGOR FOR HERIOT. — The plaintiff was lord of a manor in which the defendant's ancestor held a freehold tenement subject to various feudal incidents, including a heriot of the best beast of the tenant at his death. The tenant mortgaged his land but remained in possession and paid the yearly rent. *Held*, that the mortgagor was so seised of the tenement that on his death the lord is entitled to a heriot from him. *Copestake* v. *Hoper*, [1907] 1 Ch. 366.

A mortgagor at common law does not have legal seisin, for seisin is possession either actual or constructive under a claim of a freehold estate. *Towle* v. *Ayer*, 8 N. H. 57. Consequently, if the mortgagor had seisin his possession would be adverse, and at the end of the statutory period the mortgagee's rights would be lost, — a conclusion which shows the fallacy of the premise. The

position of a mortgagor is similar to that of a tenant at will. *Moss* v. *Gallimore*, 1 Dougl. 278. Equity, however, treats the mortgagor as the real owner and the mortgage as a mere incumbrance. *Fairclough* v. *Marshall*, 4 Ex. D. 37. Thus the mortgagor of a patent right is the "proprietor" of the right and may sue for its breach. *Van Gelder, etc., Co.* v. *Sowerby, etc., Soc.*, 44 Ch. D. 374; *cf.* 10 HARV. L. REV. 249. Similarly the owner of an equity of redemption is held to have sufficient seisin to support curtesy. *Casborne* v. *Scarfe*, 1 Atk. 603; *cf.* 20 HARV. L. REV. 407. The present case follows these analogies, and, distinguishing a mortgagee not in possession from a trustee who actually manages the property, reaches the equitable result that the mortgagor is the real owner and tenant even for purposes of the incidents of freehold tenancy.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — RIGHTS OF LIFE TENANT BUYING IN AT FORECLOSURE. — A mortgagor devised mortgaged property to the defendant's wife for life, remainder to their children. The mortgage was foreclosed, and the defendant bought in at the sale. *Held*, that presumptively the defendant is a trustee of the property for those in remainder, subject to the life estate. *Griffith* v. *Owen*, [1907] 1 Ch. 195. See NOTES, p. 639.

PATENTS — INFRINGEMENT — EFFECT OF NON-USER ON RIGHT TO INJUNCTION. — To avoid competition the complainant bought in a patent but made no use of it. *Held*, that nevertheless an injunction be granted against infringement of it. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 150 Fed. Rep. 741 (C. C. A., First Circ.). See NOTES, p. 638.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — PROHIBITION OF NIGHT WORK BY WOMEN IN FACTORIES. — A New York statute provided that no female should be employed or permitted to work in any factory before six o'clock in the morning or after nine o'clock in the evening. *Held*, that the statute is unconstitutional. *People* v. *Williams*, 116 N. Y. App. Div. 379.

The justification for statutes regulating the time or the length of the working day is the right of the state to make regulations for the public health or safety. Whether a particular statute is a reasonable exercise of such right, or is an unwarranted infringement of the constitutional guaranty of liberty and property rights, is a question for the court. *Lochner* v. *New York*, 198 U. S. 45. In a doubtful case, such as the attempt to limit the working day in mines and smelters to eight hours, the decisions are often in conflict. *Cf. Holden* v. *Hardy*, 169 U. S. 366; *In re Morgan*, 26 Col. 415. Because of the physical weakness of women and children as a class, restrictions on their work have been upheld which would be unconstitutional if applied to men. Thus, statutes regulating the length of a working day for female employees in factories have generally been held valid. *State* v. *Buchanan*, 29 Wash. 602; *contra*, *Ritchie* v. *People*, 155 Ill. 98. But the decision in the present case seems sound, as no evidence was offered showing the injurious effect on women of a reasonable amount of night work in factories.

QUIETING TITLE — BILL BY ONE WHO HAS CONVEYED WITH COVENANTS OF WARRANTY. — The petitioner had conveyed land with covenants of warranty. A levy upon it was threatened under a judgment against a stranger to the title. This judgment antedated the petitioner's conveyance. *Held*, that the petitioner is entitled to equitable relief to quiet title to the land. *Jackson Milling Co.* v. *Scott*, 110 N. W. Rep. 184 (Wis.).

Bills to remove a cloud on title are allowed, it is true, partly to relieve a plaintiff from the damage that might result to him through difficulty of proof of stale events, or through lack of evidence occasioned by the defendant's undue delay in prosecuting his claim. But that consideration alone is insufficient. There has always been the additional basis of present loss to the plaintiff by a decrease in the marketability of his property. *Cf. Bishop* v. *Moorman*, 98 Ind. 1. Inasmuch as this second element is here lacking, the present case appears not to

present facts justifying the exercise of jurisdiction to quiet title. *Chapman* v. *Jones*, 149 Ind. 434. Nevertheless, the great majority of the score or more of cases on this point allow relief to one who, like the present plaintiff, has conveyed his lands with covenants of warranty. *Pier* v. *Fond du Lac*, 53 Wis. 421; *Styer* v. *Sprague*, 63 Minn. 414; *contra*, *Chapman* v. *Jones*, *supra*. This result, which perhaps must be looked upon as representing the law, finds explanation in the disinclination of the courts to allow the grantor's sale to deprive him of a previously existing right to equitable relief, and in their apparent identification of him with his grantee. *Cf. Begole* v. *Hershey*, 86 Mich. 130.

RES JUDICATA — MATTERS CONCLUDED — ISSUE RAISED BY ANSWER OF CO-DEFENDANT. — The plaintiff and the defendant had been joined as co-defendants in a former action in equity. But in neither the plaintiff's answer in the former suit, which was in effect a prayer for the foreclosure of his mortgage, nor in the defendant's answer, which was in effect a denial of the plaintiff's claim, was the other named; nor was the plaintiff served with a copy of the defendant's answer. The only matter actually litigated seems to have been the plaintiff's present claim, and a decree was entered for the defendant. *Held*, that, in the absence of evidence showing that the question settled by the decree was not in fact litigated, the matter is *res judicata*. *Gulling* v. *Washoe County Bank*, 89 Pac. Rep. 25 (Nev.).

It is well settled that adverse rights between co-defendants may be effectually determined in equity. *Corcoran* v. *Canal Co.*, 94 U. S. 741. It can hardly be maintained, however, that a party can be bound by a decree in any case unless it is founded on some pleadings between him and his adversary. But in the present case the pleadings, though not in the form of cross-complaint and denial, should be treated as such because of their substantial effect; and the failure of the plaintiff to object to the absence of the required service amounted to a waiver. *Hapgood* v. *Ellis*, 11 Neb. 131. The pleadings, therefore, did present an issue, although issue was not formally joined. Taking this view, it is not necessary to adopt the doctrine, vigorously denied by the dissenting judge, that a question which is not directly put in issue by the pleadings may be treated as *res judicata* when the decree purports to settle it. The position of the majority on this point seems unsatisfactory. *Boston, etc., R. R.* v. *Sargent*, 72 N. H. 455; *House* v. *Lockwood*, 137 N. Y. 259; but see BLACK, JUDGMENTS, 2 ed., § 614.

RULE AGAINST PERPETUITIES — POWERS — CONTINGENCIES OCCURRING AFTER CREATION OF POWER AND BEFORE APPOINTMENT. — A testator devised to his daughter for life, with testamentary power to appoint to her children or descendants. The daughter appointed by her will to her children for their respective lives, with remainder in fee to their heirs living at their death. All the daughter's children were actually born in the life of the testator. *Held*, that the appointment is invalid for remoteness. *Brown* v. *Columbia Finance & Trust Co.*, 97 S. W. Rep. 421 (Ky.).

The validity of this power is clear. See GRAY, RULE PERP., 2 ed., § 510. The remoteness of the appointment (which must of course be reckoned from the date of the creation of the power) depends on whether it is to be interpreted and its validity governed according to the circumstances existing at the time of the appointment, when it was clear that all the donees for life were lives in being at the testator's death; or according to the outlook at the creation of the power, when the words here used to indicate those donees would have described a still open class. The principal case in adopting the latter criterion seems incorrect, as well as opposed to the weight of authority. *Morgan* v. *Gronow*, L. R. 16 Eq. 1; *contra*, *Smith's Appeal*, 88 Pa. St. 492. It is based on the idea that the appointment must be considered in all respects as written into the instrument creating the power. But this rule of thumb should not be given broader effect than the principle it was intended to elucidate, — that remoteness is reckoned from the creation of the power. It is not sensible to prevent the donee from speaking validly in language appropriate to existing conditions, when it is always conceded that the same limitations would be good with the

addition of the stipulation that the occurrence of what had in fact already occurred be a condition precedent to the limitations. See GRAY, RULE PERP., 2 ed., § 518; §§ 517–523 *f*.

SALES — CONDITIONAL SALES — REMEDIES OF SELLER. — The plaintiff made a conditional sale of goods to a company which subsequently went into the hands of a receiver. The plaintiff thereupon filed a claim of lien upon the goods, which was wholly untenable and was dismissed. The goods were then sold to a purchaser having notice of the plaintiff's rights, and the plaintiff brought replevin. *Held*, that he may recover. *Bierce* v. *Hutchins*, U. S. Sup. Ct., April 8, 1907.

There is some confusion regarding the relations between the various rights of conditional vendors. By the weight of authority, resumption of possession and action for the price are mutually exclusive remedies. *Bailey* v. *Hervey*, 135 Mass. 172. But, by the sounder view, a right to possession as security is not inconsistent with a right to enforce payment. *Thomason* v. *Lewis*, 103 Ala. 426. And unsuccessful proceedings for the price may leave the vendor rights in the chattels. *Campbell Mfg. Co.* v. *Rockaway Pub. Co.*, 56 N. J. L. 676. But a court may conceivably grant both remedies as not inconsistent and still refuse to allow resumption of possession after unequivocal recognition of property in the vendee. *Heller* v. *Elliott*, 44 N. J. L. 467; but *cf. Child* v. *Allen*, 33 Vt. 476. Such a decision must depend for support on the ground that certain conduct either amounts to an election of a remedy, or is a waiver of the condition in the contract of sale. The former doctrine, principally relied on by the defendant in the present case, is inapplicable since the attempted remedy was impracticable. *Agar* v. *Winslow*, 123 Cal. 587. The question of waiver, apparently, was not raised by the parties; though, unless a lien suit is distinguishable from an attachment, a waiver might have been found here. See *Heller* v. *Elliott*, *supra*.

TAXATION — PARTICULAR FORMS OF TAXATION — STATE INHERITANCE TAX ON EXERCISE OF POWER OF APPOINTMENT. — In 1844 property was settled on a married woman for life, remainder in fee as she should appoint by testamentary deed or will. At her death in 1902 she exercised her power by a will in the form of a deed. The appointee was taxed under the amendment to the New York inheritance tax law of 1897. *Held*, that the tax is constitutional. *Chanler* v. *Kelsey*, U. S. Sup. Ct., April 15, 1907.

A state may tax the transmission of property by will or descent, because rights of inheritance exist only by its permission. *Magoun* v. *Illinois*, *etc.*, *Bank*, 170 U. S. 283. The New York statute imposes such a tax. *Matter of Delano*, 176 N. Y. 486, 494; see also *U. S.* v. *Perkins*, 163 U. S. 625. The statute applies to the creation of a power of appointment, if by will; but in the present case the creation of the power antedated the statute and was by deed. The statute should not apply to the exercise of the power, because such exercise is not dependent on enabling statutes of inheritance, since appointees take, not under the power, but under the original instrument creating the power. *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. 61, 77; *Doolittle* v. *Lewis*, 7 Johns. Ch. (N. Y.) 45, 48. It is argued, however, that when the power is exercisable only by the will of the donee, its exercise should be subject to the tax, because its effectiveness depends on a testamentary act. See *Orr* v. *Gilman*, 183 U. S. 278. But this seems contrary to the elementary principle that the appointee takes by virtue of the original instrument. Moreover, when the appointment, though in the form of a will, is effective also as a deed, it is not dependent on a testamentary act.

TAXATION — PROPERTY SUBJECT TO TAXATION — EASEMENTS. — The appellant, the owner of land in the town of A, had a water right in the town of B, which he used to operate mills on his premises in the town of A. A tax was levied by the town of B upon such water right. *Held*, that it is taxable only in the town of A. *Matter of Hall*, 116 N. Y. App. Div. 729.

It is ordinarily held that an easement, such as the water right in question, is

not taxable real estate. *Boreel* v. *City of New York*, 2 Sandf. (N. Y.) 552; *cf.* 20 HARV. L. REV. 581. A distinction should be made, however, between taxing an easement and increasing the tax upon real estate because of an easement appurtenant thereto. It is clear that such an indirect tax on an easement is assessable only where the dominant estate is situated. *Boston Co.* v. *Newton*, 39 Mass. 22. Where incorporeal hereditaments are made taxable by statute, however, such tax should be assessed where the hereditament is geographically located. *Amoskeag Co.* v. *Concord*, 66 N. H. 562.

TAXATION — WHERE PROPERTY MAY BE TAXED — CHOSES IN ACTION TAXED TO CREDITOR AT DEBTOR'S DOMICILE. — A New York corporation carried on a money-lending business in Louisiana through an agent, the loans being negotiated by such agent and evidenced by notes of the borrowers which were sent to New York and retained by the company until returned to Louisiana for payment. Interest payments were made to the agent and forwarded to the company. A tax was levied by Louisiana upon these obligations as "credits, money loaned, bills receivable," of the corporation. *Held*, that such tax is constitutional. *Metropolitan Life Insurance Co.* v. *City of New Orleans*, U. S. Sup. Ct., April 8, 1907.

This is a noteworthy decision, in which a tendency evinced by previous cases finds its culmination. As a general rule, ordinary debts have been taxable only at the creditor's domicile. *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300; *Insurance Co.* v. *Board of Assessors*, 44 La. Ann. 760. But credits represented by some tangible document such as a note or bond are taxable where the document is found. *New Orleans* v. *Stempel*, 175 U. S. 309. So is an overdraft check employed as evidence of indebtedness. *State Board* v. *Comptoir Nat'l D'Escompte*, 191 U. S. 388. Moreover, bank deposits are taxable at the place of deposit, irrespective of the existence there of documents representing the debt. *Blackstone* v. *Miller*, 188 U. S. 189. A New York decision has even permitted taxation of open book accounts at the debtor's domicile. *People* v. *Barker*, 23 N. Y. App. Div. 524; aff. 155 N. Y. 665. The present decision is foreshadowed also in two possibly distinguishable prior cases. *Bristol* v. *Washington Co.*, 177 U. S. 133; *Blackstone* v. *Miller*, *supra*. The ground of these cases is that a course of dealing establishes a "business situs" for the capital invested, and thus protection is furnished by the debtor's domicile. However, they seem wrong on principle: an intangible right can have no situs; the capital involved is taxed in the hands of the debtor; and the only value left is the creditor's increased ability to pay, which should be reached at his domicile.

TORTS — INTERFERENCE WITH BUSINESS — CONTRACT RIGHTS. — The plaintiff supplied phonographic goods to A, who agreed not to sell to dealers on the plaintiff's suspended list. The defendant, who was on the list and knew of the contract, persuaded A to sell to it. The plaintiff sought damages and an injunction to prevent the defendant from procuring any person who had entered into agreements for the sale of the former's goods to break such agreements. *Held*, that, granting the contract is legal, no action lies for procuring its breach. *Nat'l Phonograph Co.* v. *Edison-Bell Con. Phonograph Co.*, 23 T. L. R. 189 (Eng., Ch. D., Dec. 15, 1906).

It is a fundamental principle, though unfortunately not universally recognized by the courts, that any intentional interference with a contract right by a third person, which results in damage, is *prima facie* actionable. *Lumley* v. *Gye*, 2 E. & B. 216; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239; see 16 HARV. L. REV. 299. The present case is an attempt to limit that doctrine to certain classes of contracts. The opinion does not make clear whether the attempted distinction is between contracts for personal service and all others — a distinction taken by some American courts, — or between affirmative and negative contracts. In either case it is without justification, as the essential characteristics of the right infringed are the same. *Angle* v. *Chicago, etc., Ry.*, 151 U. S. 1; *Beekman* v. *Marsters*, 80 N. E. Rep. 817 (Mass.); see 16 HARV. L. REV. 228. The court was, perhaps,

influenced by the tendency of recent English legislation to limit the liability for interference with contract rights by providing that interference with contracts of employment, if done in furtherance of a trade dispute, shall not be of itself illegal. 6 EDW. 7, c. 47. The doctrine as it now stands in England, weakened by statute and decision, is practically useless. This result is to be deplored, since contract rights should be as zealously guarded by the courts as property rights.

TRUSTS — CREATION AND VALIDITY — NOTICE TO CESTUI QUE TRUST. — G. purchased certain bonds, orally declared that he held them in trust for the plaintiffs, then infants of tender age, and informed the plaintiffs' father of the trust, but gave no notice to the plaintiffs personally. *Held*, that a valid trust has not been created. *Boynton* v. *Gale*, 80 N. E. 448 (Mass.).

As it is impossible, except by sealed instrument, gratuitously to transfer legal title to property which has not left the possession of the owner, similarly it should be impossible to create an equitable interest in such property without consideration. Voluntary declarations of trust, however, at least in the case of personalty, have been treated almost universally as effectual to create valid trusts. *Ex parte Pye*, 18 Ves. Jr. 140. The Massachusetts court has qualified that doctrine by adding the requirement that notice of the trust be given the beneficiary. *Clark* v. *Clark*, 108 Mass. 522. This limitation probably originated in a demand for such notice as evidence of the settlor's intent to create a trust. See *Brabook* v. *Boston Bank*, 104 Mass. 228. But the courts have considered the notice necessary as something equivalent to the delivery required to perfect gifts at law. See *Bailey* v. *New Bedford*, 192 Mass. 564. If these things were truly equivalent, it would seem that notice to the parent would be as effectual as the delivery of a chattel to a third person for the donee. See *Duryea* v. *Harvey*, 183 Mass. 429. The principal case shows a tendency to enforce the requirement of notice very strictly, which results in bringing the law of equitable gifts more nearly into harmony with that applied to legal gifts.

TRUSTS — FOLLOWING TRUST PROPERTY — CESTUI'S RIGHTS TO PROPERTY LOST IN BUCKET SHOP. — A trustee lost the trust funds by speculating in a bucket shop, no property being bought or sold. The *cestui que trust* brought a bill to recover the property from the proprietors of the bucket shop. *Held*, that the defendants gave no lawful consideration and must return the property to the plaintiff. *Joslyn* v. *Downing, Hopkins & Co.*, 150 Fed. Rep. 317 (C. C. A., Ninth Circ.).

To speculate on the differences between present and future prices without actually buying any property is a gambling transaction, and it is established in the United States that a contract so to speculate is void as against public policy. *Irwin* v. *Williar*, 110 U. S. 499. The courts will not, in the absence of a statute, aid either party. *Harper* v. *Crain*, 36 Oh. St. 338; *Harvey* v. *Merrill*, 150 Mass. 1. But in the case under discussion the plaintiff was *cestui que trust* and ignorant of the transaction. Since, then, the parties were not *in pari delicto*, the defendants could only retain the property, if traceable, on the argument that they were *bona fide* purchasers for value. Whether or not they gave value for the property, they can hardly find refuge in their *bona fides*, for they obtained the property by a method inconsistent with a clean conscience. Although they were ignorant of the existence of the trust, they knew that the transaction was legally invalid. There seems no reason why the doctrine of *bona fide* purchaser should protect a defendant who acquires the property by unlawful methods, although without knowledge of equities.

WATERS AND WATERCOURSES — TIDAL WATERS — PURPRESTURE. — A riparian owner built a pier beyond high-water mark without permission from the state. It was admitted that the pier was not a nuisance. *Held*, that it cannot be removed as a purpresture. *Town of Brookhaven* v. *Smith*, 188 N. Y. 74.

By the old law any structure beyond high-water mark was removable as a purpresture, — that is, an invasion of the crown's private property in the bed of a tidal stream. *Att'y-Gen'l* v. *Richards*, 2 Anstr. 603. This was changed in

most of the original states, either by statute or by usage, even before the Revolution. See GOULD, WATERS, 3 ed., §§ 169 ff. In other jurisdictions, abandoning the old law, it is said that the state holds the *jus privatum* in trust for the public, who derive benefit from the erection of wharves. *People* v. *Mould*, 37 N. Y. App. Div. 35. Another view is that the littoral owner has an interest in the beach, including the right to wharf out. *Tuck* v. *Olds*, 29 Fed. Rep. 738. But this right is always subject to state regulation. *Lincoln* v. *Davis*, 53 Mich. 375. The present case seems to state the best reasons for departing from the old rule. It holds that the right to wharf out is a necessary part of a right of access to navigable water, and that the purpresture doctrine, since it would be a great hindrance to commerce, is inapplicable to American conditions. The doctrine, however, is still recognized by some courts. *Shively* v. *Bowlby*, 152 U. S. 1.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE FEDERAL POLICE POWER. — In these days of federal activity there are no questions of more vital interest than those relating to the ramifications of the power of Congress to regulate commerce. The constitutional aspects of proposed legislation are considered by Edwin Maxey in a recent article. *The Constitutionality of the Beveridge Child Labor Bill*, 19 Green Bag 290 (May, 1907). The bill discussed proposes to prohibit carriers of interstate commerce accepting from the operators for transportation the products of any factory or mine in which children under fourteen years of age are employed, and to impose penalties on both carrier and operator for violation of the provisions. The writer contends that as the regulation is directed to operate upon processes of production which are completed before distribution begins, it is not regulation of commerce within the decisions of the Supreme Court, but rather a regulation of manufacture or mining. It is his conclusion that such a measure could only be sustained as an exercise of the police power of the federal government.

The courts of sixty years ago would have been startled at the use of the phrase "police power" in such a connection. In its origin this term was used to denote the residuum of undefined powers vested in the state governments.[1] In its later use it seems to indicate a class of powers of government directed particularly toward the conservation of the public health, morals and other interests which closely concern the well-being of the state, — powers so important that the written constitutions of state and nation are carefully construed to give them the greatest possible latitude. It is on the existence of such powers in the federal government that the writer conceives the constitutionality of this proposed legislation to depend. That the Supreme Court considers that it has some such power is not open to doubt. The strongest utterance on the subject was the Lottery Case,[2] where the court in justifying prohibition of interstate commerce said: "As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'wide-spread pestilence of lotteries' and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another." A former decision of the court seems to indicate the source of this power, the concept being, apparently, that a grant of power to the federal government carries with it a right to use that power for the protection of the public in the same manner that the state itself might have used it had the power been retained.[3]

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[1] See Police Power of the State, 39 Proc. Am. Phil. Soc. 359; What is the Police Power?, 7 Colum. L. Rev. 322.

[2] 188 U. S. 321.

[3] See *In re* Rapier, 143 U. S. 110.